1988

The State of Utah v. Andrew R. Quintana : Reply Brief of Appellant

Utah Court of Appeals

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IN THE COURT OF APPEALS OF THE STATE OF UTAH

THE STATE OF UTAH, Plaintiff/Respondent,	:	
v.	:	
ANDREW R. QUINTANA, Defendant/Appellant.	:	Case No. 880406-CA Priority No. 2

REPLY BRIEF OF APPELLANT

Appeal from a judgment and conviction for Burglary, a second degree felony, in violation of Utah Code Ann. § 76-6-202 (1953 as amended), and Theft, a third degree felony, in violation of Utah Code Ann. § 76-6-404 (1953 as amended), in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Raymond S. Uno, Judge, presiding.

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INTRODUCTION

The Statement of the Issues, Statement of the Case, and Statement of the Facts are set forth in Brief of Appellant at pages vi through 8. Appellant takes this opportunity to respond briefly to the State's answer.

SUMMARY OF THE ARGUMENT

Because identification was the critical issue in the case, the prosecutor's comment in his opening statement that his witness identified Mr. Quintanta as the man in the alley, despite a court order suppressing that evidence, probably influenced the jury's decision and thereby demands reversal of the convictions.

The State failed to provide sufficient evidence that Mr. Quintana committed the crimes of Burglary and Theft.

The giving of Instruction No. 19 over objection was without factual basis and eliminated the State's burden to prove each element of the crime beyond a reasonable doubt contrary to due process standards. The State relies on cases which are distinguishable from the case at bar.

ARGUMENT

POINT I. THE PROSECUTOR'S MISCONDUCT PREJUDICED MR. QUINTANA'S RIGHT TO A FUNDAMENTALLY FAIR TRIAL REQUIRING REVERSAL OF HIS CONVICTIONS.

The State concedes that the prosecutor inappropriately introduced to the jurors through his opening statement the previously suppressed identification of Mr. Quintana by Mr. Rains. Brief of Respondent at 12. Notably, the State does not challenge the correctness of the trial court's decision granting the motion to suppress that identification. Rather, the State claims that the prosecutor's error was harmless. Brief of Respondent at 12.

The State contends that the prosecutor's behavior must be tolerated because (1) jurors were informed that statements by counsel are not evidence and (2) substantial evidence to support the conviction was established at trial. Brief of Respondent at 15-16. Both arguments fail to squarely analyze the facts of this case under the standard announced by the Utah Supreme Court for determining whether reversal is required.

State v. Troy, 688 P.2d 483 (Utah 1984), is dispositive of this issue. In Troy, the Supreme Court found that a prosecutor's opening statement comments attacking the defendant's use of an alias (his former legal name) and his involvement in a federal witness protection program called the jurors' attention to matters outside the evidence. Id. at 485-86. Notably, the fact that the trial court expressly admonished the jurors to disregard the particular statements, as opposed to the generalized instruction by the court

in this case, was not curative of the error; nor should it be here. Such admonitions do not play a role in the analysis established by the Court.[1]

Next, the Troy Court examined the second prong of the test--whether the jurors, under the circumstances of the particular case, probably were influenced by the improper remarks--and clarified the test. The Court indicated that step two requires an examination of the circumstances of the case as a whole. Troy, 688 P.2d at 486. The Court noted:

> If proof of defendant's guilt is strong, the challenged conduct or remark will not be presumed prejudicial. Likewise, in a case with less compelling proof, this Court will more closely scrutinize the conduct. If the conclusion of the jurors is based on their weighing conflicting evidence or evidence susceptible of differing interpretations, there is greater likelihood that they will be improperly influenced through remarks of counsel. Indeed, in such cases, the jurors may be searching for guidance in weighing and interpreting the evidence. They may be especially susceptible to influence, and a small degree of influence may be sufficient to affect the verdict.

Id. (quotations and citations omitted). Critically important in the Court's explanation is that no deference is given to the jury's verdict; rather, the more conflicting the evidence and/or the more

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[1] The Court ruled in Troy that the first prong was clearly met. 688 P.2d at 486. The comments of the prosecutor in Troy are less egregious than those at issue here. Here the comments directly identified criminality rather than merely inferencing suggestively criminal behavior as in Troy. Perhaps more importantly, here the prosecutor's comments violated a pretrial suppression order; no such orders were at issue in Troy. Arguably, this distinction alone should encourage this Court to avoid tolerating the prosecutor's behavior allowing a finding that Mr. Quintana did not receive a fair trial as guaranteed by due process strictures.

susceptible the evidence is of differing interpretations, then the greater the likelihood of influence by the remarks. Accordingly, the State's analysis of this second prong of the test erroneously references their second point addressing the sufficiency of the evidence. When examining the sufficiency of the evidence, it is proper that the evidence be viewed in the light most favorable to the jury verdict, including reasonable inferences. See, e.g., State v. Petree, 659 P.2d 443, 444 (Utah 1983). When analyzing the second prong of Troy, the proper view is to focus on the susceptibility of the evidence to differing interpretations. If the evidence arguably supports either position--innocence or guilt--then the comments at issue may tip the balance inappropriately affecting the jury's decision and mandating reversal. Troy, 688 P.2d at 486-87.

Under the circumstances of this particular case, the second prong is met such that jurors were likely affected by the prosecutor's improper statement that Mr. Rains had seen Mr. Quintana come out of the alley behind the John home with something tucked underneath his shirt. This case is an identification case as unquestionably conceded by all. The prosecutor stated, "The ultimate issue in this case is, of course, whether or not [the person Mr. Rains followed] was the defendant" (R. 118 at 20). Later he again stated, "The only real issue in this particular case seems to be the question of who is responsible for that criminal conduct [--the Burglary and Theft]" (R. 119 at 73). The defense attorney stated, "When the question is identification, how prejudiced can a

defendant get when Mr. Jones tells the jury that Mr. Rains saw the defendant. I can't say it any more bluntly than that. The question is identification" (R. 118 at 21). In its brief, the State also concedes the point by stating, "The major issue before the jury and now on appeal is simply identification." Brief of Respondent at 18.

Therefore, when the prosecutor, contrary to the trial court's suppression order, impermissibly informed the jury that his witness saw Mr. Quintana in that alley with something under his shirt, the jurors heard information they were not entitled to hear which probably influenced their verdict. The jurors were probably influenced by the remarks they were not justified in hearing because those remarks provided the critical connection that no other witness or evidence could provide.

Mrs. Rains, even assuming her testimony to be credible, could only place Mr. Quintana on the front porch; she could not place him either in the premises nor with stolen property (R. 118 at 56-80). The most damaging physical evidence presented at the trial was the patch cords. The testimony introduced by opposing sides on this issue was, at a minimum, conflicting and susceptible of different interpretations such that the improper remarks of the prosecutor likely came into play and tipped the balance permitting the jury to more readily accept the State's version and return convictions on the charges.

Finally, an examination of the State's arguments on the sufficiency of the evidence encounters all the inferences and explanations the jury must have made to return guilty verdicts:

i.e., discrepancies in physical description, clothing colors, automobile license plate discrepancy, broken versus missing front grill on the truck, difficulties with recalling the basis of ability to identify Mr. Quintana, difficulties with physical capacities to identify, etc.) Brief of Respondent at 19-20. The jury could have easily decided the other way on any or all of these considerations. Therefore, the critical and determinative difference was the statement of the prosecutor providing actual identification which was erroneously before the jurors and which they probably used for "guidance in weighing and interpreting the evidence." Troy, 688 at 486. Accordingly, reversal of Mr. Quintana's convictions are required under State v. Troy.

POINT II. THE EVIDENCE PRESENTED AT TRIAL WAS INSUFFICIENT TO SUSTAIN THE CONVICTIONS OF MR. QUINTANA.

Despite conceding the critical issue of the case to be identification (Brief of Respondent at 18), the State maintains that the facts sufficiently support the convictions against Mr. Quintana. The State relies heavily on the testimony of Mrs. Rains, the presence of the patch cords in the pickup truck belonging to Mr. Quintana's brother, and various inferences from the evidence. Such reliance is misplaced and inadequate to sustain the convictions.

Mr. Quintana insists that his opening brief adequately challenges the sufficiency of evidence. He responds here only to clarify several points presented by the State.

The State claims that Mrs. Rains recognized the defendant and his truck. Brief of Respondent at 19 (citing R. 118 at 59-61, 68). The record belies that claim.

Additionally, the State claims that Mrs. Rains saw Mr. Quintana often on her way to work and specifically a few days prior to the crime. Brief of Respondent at 19 (citing R. 118 at 68-70). Again, the record belies the claim. When more closely examined, the record on this point supports the inaccuracy of Mrs. Rains' identification.

While defense counsel's initial question focused on prior to the crime, Mrs. Rains did not respond that she saw him two or three days before the crime; she stated she saw him "two or three days ago," meaning before the trial (R. 118 at 69). Counsel carefully clarified that response.

> Q. . . . When was the last time, prior to that, that you had seen the person that you thought was Andy Quintana?
>
> A. Oh, maybe a few days ago, because I drive up and down.
>
> Q. Two or three days ago?
>
> A. Two or three days ago.
>
> Q. Where was this place that you thought you saw Andy Quintana two or three days ago?
>
> A. On 9th West.
>
> Q. 9th West? (R. 118 at 69)

Mrs. Rains could not have seen Mr. Quintana two or three days before the trial because he was not out on bail; he was incarcerated at the

Utah State Prison (R. 04, 39, 42, 44, 45, 47).[2] As the Utah Supreme Court recognized in State v. Long, 721 P.2d 483, 490 (Utah 1986), "[T]he accuracy of an identification is at times inversely related to the confidence with which it is made." Moreover, Mrs. Rains' testimony can be likened to that of Mrs. H. in State v. Walker, 743 P.2d 191 (Utah 1987), where the Supreme Court noted that "her testimony exhibited a strong motivation to distort her recollection . . . in order to ensure [the] conviction[s]." Id. at 197.

Finally, the State finds it interesting that Mr. Quintana failed in his opening brief to acknowledge in either the facts or the argument the "plausible explanation of identification" offered by Mrs. Rains. Brief of Respondent at 19 n.5. It is the State's characterization of Mrs. Rains' alternative explanations of identification as "plausible" wherein the dispute lies. "Plausible" is defined as "an appearance of truth or reason, credible, believable, worthy of confidence." The Random House College

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[2] Similar inconsistencies are also dealt with by the State unconvincingly. For example, the State defends Mrs. Rains' belated claim that she gave the name of Andy Quintana to police during the initial call reporting the crime, by pointing out that the police officers who stopped Mr. Quintana in the truck did not contradict Mrs. Rains responding only that they could not recall. Brief of Respondent at 20 n.7. That assertion is untenable because, had the police possessed the name of Mr. Quintana as the perpetrator, they would not have let him leave freely while impounding the vehicle (R. 118 at 47; R. 119 at 5, 13). The State also suggests that the inconsistency in clothing description is trivial because Mr. Quintana could have returned home and changed his shorts. Brief of Respondent at 20 n.6. That explanation is disputed by the record as the testimony disclosed that Mr. Quintana did not even own a pair of shorts fitting the description given by Mrs. Rains (R. 119 at 26).

Dictionary, revised edition at 1018 (1984). When pressed on cross-examination, Mrs. Rains was unable to state with any specificity how she knew Mr. Quintana nor how she recognized the person on the porch of the John home as Mr. Quintana. See Addendum E of Appellant's Opening Brief to support that premise. Accordingly, Mrs. Rains' testimony is implausible because it lacks the appearance of truth or reason; it lacks credibility and believability and is unworthy of confidence. The State's attempt to explain away the inaccuracies of the testimony and to salvage the same as plausible is simply too demanding from this evidence.

The evidence presented at trial is insufficient such that reasonable jurors must have entertained a reasonable doubt that Mr. Quintana committed the crimes for which he was convicted. State v. Petree, 659 P.2d 443, 444 (Utah 1983). This Court should accordingly remand the case to the district court with an order dismissing the charges against Mr. Quintana.

POINT III. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN SUBMITTING INSTRUCTION NO. 19 TO THE JURY OVER THE OBJECTIONS OF MR. QUINTANA.

Mr. Quintana relies on the arguments presented in his opening brief calling for reversal of the convictions on these grounds. Brief of Appellant at 24-32. Mr. Quintana responds briefly herein to indicate that the State's reliance on State v. Johnson, 745 P.2d 452 (Utah 1987), is inappropriate. Brief of Respondent at 27. The Court in Johnson relied on State v. Smith, 726 P.2d 1232 (Utah 1986) to reach its decision. State v. Johnson,

745 P.2d at 456. Smith, however, is distinguishable from the present case. See argument in Opening Brief of Appellant, Point IIIB at 29-30. Mr. Quintana urges that State v. Turner, 736 P.2d 1043 (Utah App. 1987), rather than State v. Johnson, is controlling. See Opening Brief of Appellant, Point IIIB at 30-32. He, therefore, continues to urge reversal on the grounds asserted herein.

CONCLUSION

For any and all of the foregoing reasons, Appellant, Andrew R. Quintana, requests that this Court reverse his conviction and remand this case to the district court with an order dismissing the charges or requiring a new trial.

Respectfully submitted this 19th day of June, 1989.

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CERTIFICATE OF DELIVERY

I, RICHARD G. UDAY, hereby certify that eight copies of the foregoing will be delivered to the Utah Court of Appeals, 400 Midtown Plaza, 230 South 500 East, Salt Lake City, Utah 84102 and four copies to the Attorney General's Office, 236 State Capitol, Salt Lake City, Utah 84114 this 19th day of ~~June~~, 1989.

RICHARD G. UDAY

DELIVERED by _____ this _____ day of June, 1989.

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